

CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
MINUTES OF MEETING, Public Session

October 24, 2006

Call to order: Chairman Liane Randolph called the monthly meeting of the Fair Political Practices Commission (Commission) to order at 10:00 a.m., at 428 J Street, Eighth Floor, Sacramento, California. In addition to Chairman Randolph, Commissioners Sheridan Downey, Phil Blair, Gene Huguenin, and Ray Remy were present.

Item #1. Public Comment.

There was none.

Consent Items #3-14

Commissioner Downey pulled Item #2, In the Matter of Allen Chan.

Chairman Randolph asked if there was any public comment on any items on the Consent Calendar.

There was none.

Commissioner Huguenin moved to approve the following items in unison:

Item # 3. In the Matter of Chino Valley Unified School District, FPPC No. 06/461
(2 counts).

Item # 4. In the Matter of Planned Parenthood Advocates Mar Monte, and Ann Harrington, FPPC No. 06/081 (3 counts).

Item # 5. In the Matter of Armando Rea, California Citizens for Good Government, and Sylvia Herron, FPPC No. 02/426 (1 count).

Item # 6. In the Matter of Jeffrey E. Stone and Committee to Elect Jeff Stone —66th Assembly District, FPPC No. 02/1065 (1 count).

Item # 7. In the Matter of California State Employees Association Membership Action Committee, sponsored by California State Employees Association; Barbara Glass; and Christy Christensen, FPPC No. 05/305 (2 counts).

Item # 8. In the Matter of Barwest, LLC, FPPC No. 05/548 (2 counts).

Item # 9. Failure to Timely File Major Donor Campaign Statements.

- a. **In the Matter of Didar Singh Bains, FPPC No. 06-0422** (1 count).
- b. **In the Matter of Womar, Inc., FPPC No. 06-0537** (2 counts).
- c. **In the Matter of Singler-Ernster, Inc. dba Round Table Pizza, FPPC No. 06-0556** (1 count).
- d. **In the Matter of Lawrence S. Bond, Bond Companies, FPPC No. 06-0610** (3 counts).
- e. **In the Matter of Dry Creek Rancheria, FPPC No. 06-0611** (1 count).
- f. **In the Matter of Prime Time International, LLC, FPPC No. 06-0612** (1 count).
- g. **In the Matter of Michael Smith, FPPC No. 06-0613** (1 count).
- h. **In the Matter of Peter Sperling, FPPC No. 06-0614** (1 count).
- i. **In the Matter of Citrus Motors Ontario, Inc., FPPC No. 06-0623** (1 count).
- j. **In the Matter of Provident Credit Union, FPPC No. 06-0624** (4 counts).
- k. **In the Matter of Sbarro, Inc., FPPC No. 06-0625** (1 count).
- l. **In the Matter of Lazard Asset Management LLC, FPPC No. 06-0626** (1 count).
- m. **In the Matter of Ledesma & Meyer Construction Co., Inc., FPPC No. 06-0630** (2 counts).
- n. **In the Matter of Indian Hill Management, Inc., FPPC No. 06-0647** (1 count).
- o. **In the Matter of Physicians' Choice, FPPC No. 06-0648** (1 count).

Item # 10. In the Matter of Ronald J. Martin, FPPC No. 05/682. (1 count).

Item # 11. In the Matter of Marc Shishido, FPPC No. 06/483 (1 count).

Item # 12. In the Matter of Gregory Kirkpatrick, FPPC No. 06/484 (1 count).

Item # 13. In the Matter of Shannon Lawrence, FPPC No. 06/201 (1 count).

Item # 14. In the Matter of Elizabeth Kiley, FPPC No. 06/040 (1 count).

Commissioner Remy seconded the motion. Commissioners Downey, Huguenin, Remy, Blair and Chairman Randolph supported the motion, which carried with a 5-0 vote.

ITEMS PULLED FROM CONSENT

Item #2. In the Matter of Allen Chan, FPPC No. 04/019.

Commissioner Downey asked about the money laundering case, In the Matter of Allen Chan, in which Allen Chan apparently arranged for nine of his employees to contribute the maximum under local law to a candidate for the Chula Vista City Council. As a result, \$2,250 was laundered. He stated that he believed that Mr. Chan was aware of the restriction and that it was an inappropriate thing to do under the Commission's system, but he felt that the fine imposed for laundering \$2,250 was high. Instead, ten times the laundered amount should be sufficient. He questioned what the other Commissioners thought and whether they had the same reaction.

Chairman Randolph expressed that she did not have a problem with the fine. She pointed out that there was a discount, citing that the potential maximum fine was \$45,000. She felt that, in addition, the laundering was done to avoid a local contribution limit and that the Commission's stance has always been that money laundering is one of the worst violations of the Political Reform Act. She stated that she did not have any problem with the \$36,000 fine.

Commissioner Blair stated that the City of Chula Vista is a small city outside of San Diego and that this was a hotly contested campaign, so nine contributions of this size could make a difference in the campaign. He felt Chula Vista is not a large city like Los Angeles or San Francisco and that the fine is reasonable and punitive.

Commissioner Remy said in order to be consistent with an earlier case he would agree with staff's recommendation on the fine in this case.

Chairman Randolph asked if there were any more questions.

Senior Commission Counsel Melodee Mathay made the comment that this fine is in line with other cases with very similar facts where there are \$250 contributions reimbursed in cash. With the amount of the maximum fine going from \$2,000 to \$5,000, we have raised the fine amounts accordingly. There are very rare circumstances that the fine would be less than \$3,500 per count and \$4,000 is consistent with recently charged laundering cases.

Chairman Downey commented that it seemed the policy would continue.

Commissioner Blair moved to approve the fine for Item # 14, In the Matter of Allen Chan. Commissioner Remy seconded the motion. Commissioners Downey, Huguenin, Remy, Blair and Chairman Randolph supported the motion, which carried with a 5-0 vote.

ACTION ITEMS

Administrative Law Judge Proposed Decision

Item #15. James F. Battin, Jr., Friends of Jim Battin, Taxfighters for Jim Battin, Ravelle Lyn Greene, and James W. Trimble., FPPC No. 04/314.

Andy Rockas, Counsel to the Legal Division, presented a brief summary of facts regarding a Proposed Decision in the Enforcement Division's administrative action against Senator James F. Battin, Jr. and other respondents. He stated that on January 30, 2006, the Commission, through its Enforcement Division, issued an accusation alleging sixty-one violations of the Political Reform Act against Senator Battin and various other respondent committees and treasurers. Thereafter, the matter was set for an administrative hearing, or trial, to be held before an administrative law judge or "ALJ" at the Office of Administrative Hearings. On or about June 19 and June 20, 2006, the parties tried the case before ALJ Steven Owyang in Sacramento. He continued that on August 16, 2006, the Commission received the proposed decision of the ALJ recommending that the complaint be dismissed in its entirety. The following day the Executive Director sent copies of the ALJ's proposed decision to the parties along with a proposed post-decision briefing schedule. In a letter dated August 31, 2006, the Chief of the Enforcement Division stated that the division would not be filing an opening brief and would be taking no position on the adoption of the proposed decision. In a submission dated October 6, 2006, respondents stated that they recommended that the Commission accept the findings and conclusions of the ALJ and dismiss the matter.

Mr. Rockas then stated that the Commissioners could hear comments from the parties if they wished to and would then deliberate on whether to adopt or reject the proposed decision in closed session. If a decision were reached it would be announced thereafter in public session.

Chairman Randolph asked if the complainant in the case, the Enforcement Division, had anything to add to the letter they submitted.

Chief of Staff for the Enforcement Division, Bill L. Williams, stated they did not have anything to add.

Chairman Randolph then asked if the respondent's legal counsel, Chuck Bell, had anything to add to the letter that was provided. He did not.

Chairman Randolph asked if the commissioners had any questions before the matter was set aside and deliberated on in closed session.

Commissioner Downey stated he had three questions. First, he asked if a candidate who is undecided about running for re-election may accept a contribution that is specifically earmarked for a re-election campaign. He said this question was triggered specifically by the item in evidence in page 8, paragraph 33b, where a letter from the Associated General Contractor's PAC accompanied a \$1,000 contribution and included certain apparent conditions and restrictions: that the officeholder had already filed a Form 501 candidate intention statement, designated a

committee to accept a contribution and then stated that if that had not been done, to return the money. Commissioner Downey explained that the money had been accepted and that he was not clear how the ALJ got around that other than stating the committee didn't demonstrate the intent of the candidate to run for a particular office. He asked for clarification from the parties.

Commissioner Downey stated his second question refers to when a professional fundraiser is hired by an officeholder and the fundraiser decides to send out a letter containing boiler-plate language that money was needed for a re-election campaign. He inquired whether the officeholder can distance himself or herself from the employee who appears to be performing the duties assigned under the arrangement for fundraising. His last question inquired if an officeholder knows he will be running for re-election or office, should the Commission ask the officeholder to file a statement of intention.

William L. Williams, Jr., Enforcement Division Chief responded to the first question, stating that the Enforcement Division disagreed with the decision. However, the rationale of the ALJ was that the wording was boiler plate and contributors are not necessarily paying attention. Mr. Williams then responded to Commissioner Downey's second question, stating that the candidate is bound by the representation of the fundraiser and that the treasurers are supposed to be reviewing all documents submitted. He explained that the documents are supposed to be reviewed and that the Enforcement Division's position was that a candidate could not disassociate himself from these types of mailings.

Commissioner Downey then asked if the Enforcement Division's argument during the proceeding was that the candidate had formed an intention to run and therefore should be putting the money in a different account.

Mr. Williams confirmed that Enforcement did consider that to be objective evidence.

Commissioner Downey stated that Senator Battin knew he was going to run for one of two offices and knew that for quite some time before actually filing his statement of intention in 2003. He questioned whether that should trigger a statement of intention.

Mr. Williams reiterated that the Enforcement Division's position was that there was objective evidence of intent to run going back to the first solicitation. With the letter from the fund-raiser and the earmarking, Enforcement staff felt there was objective evidence.

Commissioner Downey asked Mr. Williams whether a current officeholder that has narrowed his options to running for re-election to the Assembly or for the State Senate would, be under the rules of the Commission, need to file two statements of intention.

Mr. Williams explained that Enforcement's position was that he was running for the Senate and there was speculation that he might be able to run for Congress. He stated that Enforcement did not feel the case was so ambivalent.

Commissioner Downey asked whether, if Technical Assistance gets a phone call tomorrow from a current sitting Assembly person who is going to run for re-election or run for Congress, that person should be filing a statement of intention for re-election.

Mr. Williams stated that Enforcement's position was that intent to run for office, combined with a solicitation, means the candidate has to file a Form 501.

Charles Bell, respondent's counsel stated that an impartial judge looking at these allegations found the facts did not support the legal claim that was made. Mr. Bell went on to address the three questions Commissioner Downey had posed. Mr. Bell explained that it seemed there is no requirement in the statute or regulations that if a candidate is speculating about what he or she might want to do, the candidate is required to file a notice of intention. What triggers this is if someone is going to raise money for a re-election effort. He stated that if the Commission wanted to look at the issue of changing the boundaries of whether someone ought to file a notice of intention in certain circumstances, it would have to police the press comments and probe deeper into the candidate's intentions. Mr. Bell addressed the second question by stating that the evidence was pretty clear that a form letter was taken by an assistant and sent out to someone who had previously attended a fundraiser and that the fundraiser herself acknowledged that was the case. He questioned whether that should have set off a domino effect that resulted in the treatment of all of the funds that had been raised to be re-election funds. He stated that determining a candidate's intention would be a useless exercise.

Chairman Randolph stated the process is to deliberate on this in closed session and a decision would be announced at that point.

Item #16. Prenotice Discussion of Proposed Revolving Door Regulation 18746.3 (Section 87406.3).

Commission Counsel Brian Lau presented proposed regulation 18746.3 for prenotice discussion. He stated this item is presented to interpret Section 87406.3, similar to the one-year ban for state officials in 87406, a local one-year ban which prohibits former local officials from communicating with their former agency to influence certain actions and proceedings if the communication is made in representation of another person and for compensation. He stated there are three key issues with a local one-year ban. First, which officials are covered by the ban. Second, whether local officials representing their own personal interest are excluded from the ban. Third, what is included within the definition of administrative action which is defined to include both quasi-legislative and quasi-judicial proceedings for purposes of a local one-year ban. He stated staff anticipates re-drafting subdivision (a) (4) prior to noticing the regulation for adoption to clarify that the one-year local ban includes the general managers or chief administrators of air pollution districts. He stated staff proposes noticing regulation 18746.3 for adoption at the December 2006 commission meeting.

Commissioner Remy asked whether an elected city clerk would be subject to the ban and whether an appointed city clerk would not be.

Mr. Lau stated that elected officials are covered by the ban and that appointed city clerks do not appear to fit under the ban.

Commissioner Remy asked whether there would be instances where similar people are treated differently, one would be covered and one would not be covered. He asked whether a county department head, that is head of a special district but reporting to the county supervisors, would be covered by the ban. He asked whether a county department head that is not a special district, even though he/she is the reporting supervisor, would not be covered by the ban.

Mr. Lau stated that he believed that at strictly a county level, only the chief administrative officers would be covered. For special districts, he stated that general managers holding positions with an agency under 82041 are covered by the ban. He stated that 82041 would determine whether the officials would be subject to the ban.

General Counsel Luisa Menchaca stated subdivision (a) (4) includes general managers and chief administrators of special district. She stated the statute does create those distinctions.

Commissioner Remy questioned the role of a city manager who is not able to interface with a governmental agency upon leaving his/her post, to what extent would that manager working as a manager for another city be precluded from having any interface with his/her former city.

Mr. Lau stated that as long as one is representing another public agency these restrictions do not apply to that manager.

Chairman Randolph asked if someone was to do a two month assignment with City A, and then moved to a six month assignment with City B, that person would not be allowed to come back and represent another person in their private capacity with City A, but would be allowed to interface with City A as the city manager of City B.

Mr. Lau stated that is correct.

Commissioner Remy asked whether an elected mayor of a city who was also elected as the president of the regional agency, who then left to become a redevelopment director of a city within the same area, would be able to interface back with that regional agency.

Mr. Lau stated that as long as that person was representing another public agency, he/she would be able to interface with their prior agency.

Commissioner Downey brought up an issue with subdivision (b) of the proposed regulation. He asked if the second sentence of subdivision (3) states that if one is merely getting travel, meals and accommodations, they are not deemed compensated for the purpose of this prohibition.

Mr. Lau stated that is correct.

Commissioner Downey asked if the sentence which states: a payment made for necessary travel, meals, and accommodations received directly in connection with voluntary services is not

prohibited or limited by this section could be changed to state “does not constitute compensation for purposes of this section.”

Mr. Lau agreed that would be more accurate language.

Commissioner Downey suggested fine-tuning the language.

Mr. Lau agreed.

Commissioner Downey brought up the issue of local elected officials and asked if some mayors are elected by the populace and others by the members the city council from their membership are they both local elected officials.

Mr. Lau stated without researching the issue but drawing from the plain language of the section that he believes both would be local elected officials.

Chairman Randolph reaffirmed that to be selected mayor by other council members, one has to be elected to the council in the first place.

Chairman Randolph asked if there was any public comment.

There was none.

Chairman Randolph stated this regulation was scheduled for adoption in December and asked the Legal Division to make the changes discussed in their staff report as well as what Commissioner Downey had talked about.

Item #17. Adoption of Proposed Amendments to Regulations 18421.1 and 18216: Reporting of Recurring Electronic Contributions.

Staff Commission Counsel Emelyn Rodriguez presented for adoption proposed amendments to Regulation 18421.1 and 18216. She explained that, due to the narrow scope of this project, that there was no pre-notice discussion. Staff had noticed the proposed language with the Office of Administrative Law and was asking the Commission to adopt the regulations as amended. Comments were received on October 23 from Doug Heller with the Foundation for Taxpayer and Consumer Rights. His letter was essentially concerned with pledging abuses. Staff viewed this project as separate from the much larger and more complicated issue of pledging which is considered as a separate project for next year’s Regulation Calendar. Staff’s proposed amendments deal with the very narrow issue of reporting of electronic installment payments.

Ms. Rodriguez briefly discussed the issues raised in Mr. Heller’s letter. First, she referred to the letter’s statement that the proposed amendments would result in less disclosure. She explained that this statement does not take into account the fact that these are clarifying amendments intended to be consistent with existing advice and to be consistent with the Commission’s statutes which currently do not consider unenforceable promises as contributions. Secondly, the

author's letter stated that all installment payments, not just electronic installment payments, should be fully reportable as enforceable promises as of the date of the pledge or the date the first payment is made. She stated this shows that the issue being addressed by the letter is much broader than the scope of the project. She explained that staff had proposed these amendments to provide guidance and to clarify how installment electronic payments are to be reported consistent with the statutory definition of contribution under Section 82015. She stated that under the section, unenforceable promises are not contributions under the Act and are not reportable. Lastly, she stated the author of the letter assumes just because an amount is scheduled for an installment payment that a candidate or committee is guaranteed the funds because it is "in the pipeline." She stated this comment does not take into account the statutory definition of contribution as an enforceable promise to pay and also ignores the fact that a contributor may change his or her mind at any time with regard to a promised payment. She further stated that requiring the up front reporting of these installment payments would not lead to relevant reporting as the author of the letter suggested, but rather could lead to inaccurate reporting of contribution dates and amounts received.

Ms. Rodriguez explained that the proposed amendment would actually strengthen disclosure by allowing for more accurate reporting of electronic installment payments. The proposed amendments attempt to clarify the Commission's rules for reporting of recurring or installment electronic payments. The amendments to Regulation 18421.1(e) would specify that the contribution is reported as received when the candidate or committee or agent of the candidate or committee obtains possession or control of the funds for each installment payment. Therefore, each installment payment is treated like a separate transaction with a date and amount of each scheduled payment reported separately. The proposed amendments would also specify that the amount reported received is the amount of each installment payment. The amendments also clarify that electronic installment payments that are essentially agreements to make future payments are not considered enforceable promises. Thus these promises to make future payments cannot be reported as contributions until the candidate or committee obtains possession or control of the funds. She stated that staff recommends that the Commission adopt the proposed amendments to Regulations 18421.1 and 18216.

Chairman Randolph asked how it should be reported if someone has a non-electronic installment payment and they want to give \$90 but they can't afford to do it right away, but will give \$30 this month, \$30 next month, and \$30 the next month, without giving their credit card information.

Ms. Rodriguez replied that it is reported as it is received.

Chairman Randolph asked how it would be reported under the current rules if this person did give out the credit card information.

Ms. Rodriguez answered that it would be reported as received. Currently the Commission does not give the advice to report the lump sum amount.

Chairman Randolph asked if there was anything right now in the law that specifically states the \$90 has to be reported at the moment the credit card information is provided.

Ms. Rodriguez stated it is unclear and that is why staff is trying to provide guidance to the regulated community.

Commissioner Blair added that the payment could be cancelled at any time so why the candidate should be made to report the \$90 when they might have only received \$30.

Chairman Randolph stated that is the larger question that Ms. Rodriguez referred to which is whether non-enforceable promises to pay should be reported.

Ms. Rodriguez replied that that is outside the scope of this project.

Chairman Randolph asked if there were any other questions or any public comment on this item.

There was none.

Commissioner Huguenin moved to approved Item #17. Commissioner Blair seconded the motion. Commissioners Downey, Huguenin, Remy, Blair and Chairman Randolph supported the motion, which carried with a 5-0 vote.

Item #18. Regulatory Calendar – Proposals for 2007

Assistant General Counsel John W. Wallace presented the proposed Regulatory Calendar for 2007. He referred the Commissioners and Chairman to the copy of the memo before them setting out the different items. Some of the items have been calendared and he also listed items currently not calendared but that the Commission may wish to instruct staff to add to the calendar. He stated that in December a final calendar would be presented reflecting all the changes and decisions made today.

Mr. Wallace pointed out items for comment. He stated first that the calendar is based on the assumption there will be twelve commission meetings during the next year and traditionally there has been one meeting that doesn't occur, generally August's meeting. He stated that if it was decided to have a month without a meeting that the calendar would need to be adjusted accordingly and it would probably make the other months heavier.

Mr. Wallace stated that the second thing he noted was that there are three bills that will need to be reviewed to see if they need regulatory interpretation. He stated that more information would be available in December as to whether the bills need to be added to the calendar, but that he wanted to remind the Commission the bills are not currently on the calendar. Also with respect to the bills, Mr. Wallace noted that the memo mentions SB 145, which is a bill that allowed State officers to establish officeholder committees and raise officeholder funds. He noted that in the memorandum that item will be taken up as an emergency item in December. Mr. Wallace stated the Legal Division is considering holding an Interested Person's meeting in November and that will probably mean that action on the regulation would either be in December or early next year.

Mr. Wallace stated there were four final items not on the calendar. Commissioner Huguenin proposes amending regulation 18215(c) (9) to reflect the Proposition 34, “member communication” exception, which is broader than that provided in regulation 18215. Part of the reason the difference is that 18215 applies to both candidates and committees and Proposition 34 applies only to candidates for state office. He stated that Commissioner Huguenin proposed that item be added to the calendar to see if those two exceptions can be made more consistent.

Mr. Wallace stated that a letter from Chuck Bell requests the Commission address an issue concerning sponsored committees. There is an exception for certain payments that sponsors make to support their sponsored committee that is not considered a contribution. Mr. Wallace stated that Mr. Bell had asked the Commission to clarify where that line is and the Commission could do that by opinion, or regulatory action, which was not on the calendar.

Mr. Wallace brought up the last two items. He stated that if the Commission would like staff to look at the pledges issue that was disclosed earlier in the day, that staff could review it and come back in December. He stated it’s clear to staff the issue would require legislative action in order to have some type of disclosure of unenforceable promises and that it raises a lot of policy considerations.

Mr. Wallace stated that finally, another item listed that was not calendared was 85310 (c). He stated this item may need a regulatory or statutory fix. The statute requires disclosure and sets contribution limits under certain circumstances where a communication identifies a state candidate, but does not expressly advocate the candidate’s election. Mr. Wallace explained that the question staff has received is what happens when a candidate has behested the communication but it is his opponent who is negatively featured in the communication. The issue is whether that scenario would trigger the limit in the statute. He stated this may need a legislative fix.

Mr. Wallace stated that staff’s position is the calendar has a lot of work for the year and if they desire to have any of these uncalendared items added staff would need to look at removing some of the existing items on the calendar.

Chairman Randolph suggested the Commission go through the four uncalendared items to see which, if any, should be added. She suggested they start with the reserve projects. The first one was the member communications issue. Chairman Randolph stated there were some inconsistencies there so it would be useful to calendar the item. Chairman Randolph asked if anyone had concerns.

Commissioner Downey stated he believe they owe great deference to items that are proposed by part-time commissioners.

Commissioner Remy asked if by adding the uncalendared items, what the effect on work-load would be and the budget implications. It’s consistently said that if the Legislature asks us to do other things, then we should identify things that we are unable to do. As a result, we ought to be compensated. He questioned if we’re talking about a 2% difference or a 20% difference if we add all of the requests.

Chairman Randolph replied that staff has their regulatory budget of items they can include in addition to advice letters and potential litigation and various things. If some of these other priorities are to be added, we need to look back at the rest of the calendar and maybe pull some of these lower priority items. We may end up having to weigh competing interests.

Mr. Wallace stated that when the original calendar was made by Executive Staff they did weigh the size of the projects. He stated the Commission might be adding a project that could require the removal of several projects. All of that would have to be explored and would be brought back in December.

General Counsel Luisa Menchaca added that of the four areas that were summarized by Mr. Wallace, probably three of the four are projects that would be complicated and would be defined as larger regulatory projects. She stated staff was talking about more in terms of the 20% range that Commissioner Remy asked about. One of the primary impacts if the Commission wanted staff to address all of the regulatory projects, for example, would be an impact on the Commission's ability to render more timely written advice as in the strategic plan. She stated staff had made some progress in that area and it would be something they would have to consider.

Commissioner Downey asked which one would be the exception of the four that isn't such a large task.

Ms. Menchaca replied that the last one in terms of the 85310 (c) may not be as broad in the sense that pledges and member communication issues would require broad consideration of construction and reporting issues, all of which would be projects requiring Interested Persons meetings and consider how they would impact other Proposition 34 regulations.

Chairman Randolph stated once they decided which of the four they wanted to continue to discuss they would go back and look at what items they want to pull.

Chairman Randolph brought up the second item, Mr. Bell's proposal. She stated she did not have strong feelings about this one and it seemed to be an unsettled issue. She said she believed the Commission should take a look at it.

Commissioner Huguenin agreed.

Chairman Randolph stated it should not be handled any further via advice letters because it's broader than advice letters. Her opinion was that a regulatory project would make sense and suggested it be added as well.

Chairman Randolph suggested the pledges item should be taken up in two different parts and initially just a staff memo was needed that explains the history of this issue. There is a fair amount of history of the question of reporting unenforceable promises. Her suggestion was to have a staff memo explaining the statutory issues involved and the history of the issue and then at that time the Commission can decide if it wants to proceed further with possible changes.

Commissioner Huguenin said in their previous discussion they committed to looking at this by responding silently to the letter we got from Mr. Heller. He agreed that the Commission did need to look at it and that kind of report would be appropriate.

Chairman Randolph brought up the last item, 85310 for discussion. She expressed that this one was a tough issue due to the fact that it may need some statutory changes to address it. She suggested setting it aside and putting it on the legislative calendar which would be coming in November. She stated they might want to consider bumping the gifts of travel proposal on page 10. The other item was page 7, item 8, requiring committees controlled by a candidate to include the name of the candidate. Although being a fairly straight-forward project, it might not give the Commission enough room if they bumped that item.

Commissioner Downey expressed desire for the Commission to keep that item on the calendar.

Chairman Randolph stated the Commission would keep that one. She believed they should keep the net-debt, general purpose committee and filing dates.

Commissioner Downey asked if it would be a problem to pull the gifts to agencies.

Chairman Randolph stated it probably was not a problem. She agreed to set the item aside as well.

Commissioner Remy remarked that he did not have a sense of what the downside was by eliminating the ones the Commission was discussing and when they are eliminated, would it be an even trade-off in time and staff commitment to what is being added and what is lost.

Chairman Randolph replied that some of the ones on the list are things that have been out there for some time. She stated it would be nice to clean up and clarify them, they are not immediate problems.

Commissioner Downey asked if staff would come back to the Commission, possibly with some disagreements and whys and the Commission would listen again.

Mr. Wallace stated they would be back in December. He stated they would explore those issues and will have everything come back and describe what the impact would be.

Mr. Wallace stated there is a budget enhancement so they might be getting more staff so there will be more people to do the work. He asked for clarification on which items were being considered for elimination.

Chairman Randolph stated they were recommending eliminating item # 2 and 3.

Commissioner Huguenin asked if elimination meant striking or letting it slip and holding in abeyance until the Commission has more space.

Chairman Randolph responded with the latter, letting it slip and holding it in abeyance. She asked if Legal staff would be back in December.

Mr. Wallace answered it would be December.

DISCUSSION ITEMS

Item #19. Diversion Program.

Enforcement Division Chief William L. Williams, Jr., stated that at the May 11, 2006, Commission Meeting, the Commission requested that the enforcement division move ahead with the concept of a diversion program. A diversion program would provide an alternative to administrative prosecution under the Act for minor violations and would be similar to diversion programs currently offered by many agencies. He explained Enforcement staff was bringing this back as a discussion item seeking further direction from the Commission on implementing a diversion program which has been broken into 7 decision points for consideration.

Mr. Williams presented the first decision point, whether the Commission should adopt a regulation implementing a diversion program. The first issue is the authority for a diversion program. He stated Enforcement's Division position that a diversion program would be within the scope of prosecutorial discretion as an alternative to prosecution but there is no statutory authority for this specific diversion program as there are for most diversion programs carried on by other agencies. It was also staff's feeling that because it is a policy or rule of general application, it should be done by regulation. That process would also allow for the greatest input from interested parties who might want to participate.

Mr. Williams presented three options for the Commission's consideration relative to the issue of violations that might be included under a diversion program. At the May 11, 2006, meeting the Commission indicated it preferred a percentage threshold to allow for wider participation in the program. As part of the process of developing various options, staff looked at Enforcement cases from 2004 as a sampling to project potential participation in the program. In reviewing the 2004 cases, the 5% threshold would have resulted in very few participants in the program. Also based on the sampling, application of a percentage threshold would probably result in increased investigation at the intake level in terms of getting the campaign statements necessary to calculate whether someone had met the percentage threshold.

Mr. Williams stated staff has provided the Commission with options 2 and 3, based on set monetary thresholds of \$30,000 and \$50,000 dollars. Staff believes the set monetary thresholds are easier to apply and would result in greater potential participation in the program according to the 2004 case sampling. Options 2 through 3 are the same except for the differences in the thresholds and the fact that Options 2 and 3 include nonfilers, while Option 1 does not. A percentage threshold does not work in a nonfiler situation because there is no ability to calculate a percentage.

Mr. Williams stated under Option 1 using the 2004 case sampling including streamlined eligible cases, only 3 cases would be eligible for diversion. Subtracting out the streamlined cases one case would have been eligible for diversion. Under option 2 and the \$30,000 threshold including streamlined cases, 95 cases were potentially eligible for the diversion program. Subtracting out the streamlined cases, 75 cases would have been eligible for the diversion program. The majority of the cases would be campaign non-disclosure and campaign non-filing cases.

Chairman Randolph asked if Option 2 was the recommendation from Enforcement staff.

Mr. Williams replied that Option 2 was the recommendation and that Option 3 is the same as Option 2, only with the \$50,000 threshold instead of the \$30,000 threshold.

Chairman Randolph noted there was a typo on page 7. She asked if what it currently said, “under Option 3 using the 2004 case sampling and the \$30,000 threshold” should actually read “\$50,000 threshold”.

Mr. Williams noted it was an error and should be \$50,000.

Chairman Randolph asked if in an average year we get 800 complaints.

Mr. Williams replied that sounded right but that it could spike in election years.

Chairman Randolph asked if the Commission was looking at almost 100 cases for diversion.

Mr. Williams replied yes and stated that it seemed to be a relatively workable number as far as a start-up of the program.

Chairman Randolph asked if most of these were campaign cases as opposed to conflicts of interest.

Mr. Williams stated that most would be campaign non-filer and campaign non-disclosure cases but there is a portion of the other categories. He stated that Enforcement staff’s recommendation is that the Commission considers the adoption of diversion by regulation. They also recommended that the Commission use Option 2 thresholds with the discretionary exclusion factors. He stated they believed that Option 2 with the \$30,000 threshold would get the minor violations in, where as the \$50,000 threshold might bring in some more major violators. He also recommended that streamlined cases be excluded from diversion since the streamlined program is already a workable program for minor violations and he feels would eviscerate the streamlined program to put it under diversion. He also recommended that cases that were approaching the statute of limitations be excluded from diversion so that diversion can’t be used as a delaying mechanism or put the Commission up against the statute of limitations unnecessarily.

Commissioner Downey asked if the enforcement division would require a stipulation extending the statute if somebody elected diversion.

Mr. Williams replied that in the memo it was not required but they have recommended that the Commission require anyone entering into the diversion program waive their administrative hearing rights so that if they do not complete diversion, it would just be a summary proceeding before the Commission which is a further decision point down the line.

Chairman Randolph asked if they would run into problems with audits since it takes a fair amount of time to get through the audit process so by the time Enforcement gets them, they're already pretty old. As a result, many cases from FTB are pretty close to the two years and it's not the respondent's fault.

Mr. Williams agreed that could create a problem. Most audits, when they make material findings, would probably be cases that would not necessarily be diversion eligible because when they make material findings of violations they have already concluded it's a fairly serious violation that would probably be excluded from diversion. Mr. Williams suggested the Commission consider a tolling agreement as part of the diversion referral process.

Commissioner Downey stated he believed there should be flexibility.

Chairman Randolph asked if there would be a hard and fast rule to seek a tolling agreement within two years of the statute of limitations.

Mr. Williams stated he put that in because he was concerned that diversion could then somehow become some sort of tactical tool in a litigation strategy.

Chairman Randolph then asked if it's within or approaching the two years, the Commission would have to require a tolling agreement.

Commissioner Huguenin stated that in the discretion of Enforcement Division could require a tolling agreement.

Mr. Williams stated he believed that sounded like a reasonable solution. He also requested that it be limited only to those that admit their violations.

Mr. Williams stated that one thing the Commission could consider in lieu of an overall diversion program is the expansion of current streamline programs to include recipient committee nonfilers. This would not have the educational component that the diversion program has but it would be an expeditious way of handling these cases and also would result in a minor fine.

Chairman Randolph said they had talked about the scope and briefly alluded to discretion to exclude cases. She stated they had discussed that Enforcement would have discretion to say based on the listed factors this shouldn't qualify for diversion. She stated that in terms of the timeframe, each case should be based on the individual agreement with the respondent but we should probably have a not-to-exceed timeline in the regulation.

Chairman Randolph asked if participation in the program would not automatically be an aggravating factor, but said it could be evidence of the person's knowledge of the act.

Mr. Williams stated they are requesting that it be evidence of notice of what their obligations are under the Act.

Commissioner Blair stated that at the top of page 4, Enforcement Division recommends they extend the time to complete the program based upon good cause. He asked if that could continue the one year timeframe.

Mr. Williams stated it would.

Chairman Randolph brought up the issue of streamline versus diversion.

Mr. Williams stated it would still be an expeditious way of handling the cases with a relatively minor fine. He stated they could include an educational component by sending a fact sheet or a manual, depending on the nature of the violation.

Commissioner Huguenin asked about page 13 where Enforcement calculates start up costs. He asked if there would be an off-setting reduction of staff time associated with moving 75 cases out of regular processing into the diversion program.

Mr. Williams stated his understanding was that some of the idea of diversion was not so much that it would offset staff costs as much as it would allow staff to focus on more serious cases and put more time into more serious cases and backlog. He stated it was difficult to project from the 2004 cases and that they were doing rough ballpark estimates as far as how much time they believe it will take for intake to refer someone to diversion.

Commissioner Huguenin expressed that part of this is building efficiencies into the Enforcement Division to help Enforcement reallocate time that is limited.

Mr. Williams stated that you could figure that whatever the time is that we're anticipating the staff is going to have to be committing to referring something to diversion would be time that could be used by investigators at the very least in other cases. He stated it would be more time because if something goes to full investigation the investigator and the attorney are going to spend quite a bit more time with it than what has been set out for just for the referral process to diversion.

Commissioner Remy brought up the issue of reallocation and questioned would we be able to cover the cost of this program as opposed to an add-on. He expressed that it is important to know where the funds come from as well as knowing if the Commission would have to cut something somewhere else. He asked if this becomes the highest priority of any budget monies that we get in the enhanced budget.

Mr. Williams stated he was going conservatively in terms of not taking into account an offset and just saying this is how much we thought we needed for start-up in terms of extra work and staff time at intake. He said they were going conservatively until we have a track record with this program.

Chairman Randolph brought up the issue that cases that currently qualify for the streamlined program would be excluded from the diversion program. She said you end up with an anomaly where if someone has a minor violation they go on the agenda and pay a fine and if you have a more serious violation of failing to file you're in diversion and you're not on the agenda.

Mr. Williams stated that since the thresholds for the streamline program are \$10,000 he did not see where there would be any conflict. Basically all of the major donor nonfilers within a certain level are going to go into the streamline program so there wouldn't be some other major donor nonfiler who would be in the streamline program.

Chairman Randolph asked if you would have recipient committees who are in the diversion program that do not qualify for the streamline program.

Mr. Williams stated that would not be any different than what Enforcement does right now with recipient committees. They are treated differently than major donors because there's no streamlined program for them so they get treated in a manner that's more consistent with the fact that they are considered to be more sophisticated and more culpable for violations of the Act.

Chairman Randolph asked whether now, if a recipient committee makes a mistake and is fined, it goes on the agenda with a fine and full stipulation with no option to go into the streamlined program.

Mr. Williams said yes.

Chairman Randolph asked if we were to adopt the diversion program, they would go into diversion. They would not be on the agenda and would have the opportunity to take the class, but a major donor who has a less serious violation, between \$10,000 and \$30,000, would qualify for the streamlined program.

Mr. Williams stated that they would be able to look over at recipient committees getting better treatment than they are getting as major donors.

Chairman Randolph stated that was her question.

Mr. Williams asked if he could take a look at that issue in the sense that the Commission does not want to be making it worse for major donors. One of the problems is that the legislation that would have raised the threshold to \$30,000 for major donors did not get signed. He stated Enforcement staff could take a look at that and see if there is some way to reconcile the inequity Chairman Randolph had raised.

Chairman Randolph stated it seemed to her that the only way to reconcile it is to either not have a diversion program and put everyone in streamline and expand the scope of the streamline program or if someone qualifies for either diversion or streamline, they would have the choice to go into diversion. She stated she believed what Enforcement staff was proposing was to say they would not have the choice and she believed they should have the choice.

Mr. Williams stated that would mean only major donors of over \$30,000 would be the ones that would be outside of the diversion program. He believed it would be workable but it would significantly reduce the streamline program.

Chairman Randolph asked for feedback from the Commissioners on their thoughts on just expanding the streamline programs and not doing diversion at all. She stated that her sense was that she liked the educational component of the diversion program and did not like jettisoning that.

Commissioner Blair asked whether the education component would be workshops or online.

Technical Assistance Division Chief Carla Wardlow replied that currently they would probably send out one of the Political Reform Consultants to conduct a two hour workshop.

Commissioner Blair inquired if it would be around the state and they would have to come to different locations if they chose this option.

Ms. Wardlow stated that one of the things discussed was having them regularly scheduled twice a year: once here in Sacramento and another one in Southern California. Depending on the level of participation we could always have three or four of them a year. She stated she did not anticipate that we would be conducting the workshops outside of Southern California and Sacramento.

Commissioner Blair pointed out that the memo says they must be completed within one year so we would have to offer it fairly often.

Ms. Wardlow stated she had proposed they attend one of our regular candidate workshops and then we would develop a separate program for other types of recipient committees, ballot measure committees and general purpose committees that we would conduct at least twice a year.

Commissioner Blair asked if Ms. Wardlow saw this as being like the ethics training that is required. He asked whether it would be on a CD and you just mail it out to them or online.

Ms. Wardlow stated they have talked about creating online workshops. She said they haven't been successful at finding the funding to put that together. She said it could certainly be an online training program and one of the recommendations with regard to violations of the gift limit or conflict-of-interest disclosure would be to require the official to take the ethics training that is available online.

Chairman Randolph opened the matter up for public comment.

Jenny Eddy from Neilson Merksamer commented that they were considering a certain circumstance where if the program was expanded to bring in a major donor from the State of New York who failed to file a major donor campaign statement who wanted to utilize the diversion program, will someone from New York really be asked to come to California to take a

class. She stated they favored an online system or a CD that would enable people who are across the country and engaging in politics in California to take that class. She stated another concern was if you have a corporation or entity that is not an individual, how would the Commission specify who is to come take the diversion program training session.

Chairman Randolph asked if there were any other public comments.

There were none.

Chairman Randolph commented that with the example of a corporation that they could choose the person who is responsible or they could just pay the fine.

Mr. Williams added the program might not be a one size fits all in terms of every variation that might be brought up.

Chairman Randolph stated that they had an idea of how much staff time this would take to set up, but not what the offsetting staff time would be. She asked if they still wanted to pursue the concept of diversion or would they rather look at expanding the streamline programs. She said she believed that would take a fair amount of staff time as well.

Mr. Williams stated it would take a fair amount of time but in terms of just the normal hitches that come with a new program and fine-tuning, it would run more smoothly and it would take less start up because they already have similar experience with the existing streamline program.

Commissioner Huguenin asked if they could put a training component into the streamlined program.

Mr. Williams replied that the idea he had mentioned is that they could send out educational materials when someone agrees to participate in the streamlined program. He stated they could send out the normal publications that informed them what their obligations were relative to their violation to assist them in learning the Act.

Chairman Randolph stated that their two choices were to direct staff to come back with a regulation to implement the diversion program as described, with some accompanying information giving them more information about costs and savings. She stated the other option would be to ask the Enforcement staff to come back with a memo outlining an expanded streamlined program that would encompass more violations.

Commissioner Blair inquired if a candidate fell in the category of having a choice of streamlined or if they were to go through the education component, would they still pay the same fine.

Mr. Williams said no. If you go to diversion you will not be paying a penalty.

Chairman Randolph added you would not be on the agenda.

Commissioner Blair said that would mean it would be much less public. Mr. Blair asked if the educational component would be in lieu of fines.

Mr. Williams replied that yes it would.

Commissioner Huguenin stated the only operative expense might be what you'd have to endure going through the training and the time.

Commissioner Downey asked if we could charge them some fee such as \$50.

Mr. Williams stated that when you start talking about using CD's and online and upkeep on that you are talking about a whole different thing. He stated that perhaps a fee would be appropriate so that we could subsidize the increased cost of that.

Commissioner Downey asked if we have any income aside from our state funding.

Chairman Randolph asked even if we collected a fee, would it come to the Commission or to the general fund.

Executive Director Mark Krausse commented that they could probably figure out a way that if a fee was levied for training, that fee would come back to us. He stated the notion in earlier discussions was that the Commission would be reimbursed in some fashion for the training. He also added that when talking about CD ROM or some other online training, they are already seeing what looks like cheating. In recent experience with the local ethics training module, people are going online and only viewing a certain number of pages and jumping to the last page for certification or not viewing it for nearly enough time to even read the entire training and jumping to the last page. He stated that if the Commission were to have that kind of training, to have a meaningful test that they would have to test by a given score.

Commissioner Remy asked if they could see what rehabilitation programs or diversion programs would look like, what they would cost, and how they would be funded. He added parallel to that is the streamlined program and they would have some kind of picture of cost and outcomes.

Mr. Krausse pointed out that it would be most accurate to strip out cases from the streamline program. Right now we use a ½ time position to do all the streamline cases. He stated that if we were to decide how many person hours it takes to close a case, the numbers do not look very good. He added that part of the reason is they are putting a lot of time into cases that ultimately get closed with no prosecution. There is a lot of time being spent on cases that do not ultimately result in a fine. It's a matter of going in and keying that information in the database to get to the numbers needed.

Chairman Randolph stated that just getting to the 2004 analysis of which cases would be eligible and which would not, took a lot of Sandy Johnson and Bill Williams' time to go through the data to look at the cases to figure out how many cases we're talking about. She added it certainly is not impossible to get more refined numbers but she said she did not want to spend too much time unless we have some idea of which direction we want to go in. She said she is trying to gauge the

level of interest in doing diversion as opposed to coming up with a streamlined program and at the same time trying to figure out how we can expand our educational role.

Commissioner Downey stated our goal here is to reduce violations through education and it seems that when we're talking about Diversion we are not talking about those intentional violators or the money launderers or that sort of thing. He stated they have the unintentional violator who is going to be given the choice of paying the fine and going away or go through diversion, get educated and presumably be less likely to violate again. He stated he liked the notion of diversion because it fits the educational aspects of the Commission's obligations. He asked to hear Enforcement's opinions and experience with the streamline program.

Mr. Williams replied that even without the educational component, participation in the streamline program for major donors is educational. They know what their obligations are in terms of filing when they are finished. They've had a nominal fine and in terms of what they are on the agenda, they're not quite so high profile on the agenda as cases that have been fully investigated where the agenda shows every single thing that was involved in the case. He stated that the streamlined programs allow them to hit the ground running and to absorb more into those streamlined programs is something that we've already thought about. We could do that fairly easily whereas with diversion there is a certain amount of uncertainty in terms of participation and the cost. It's very difficult to project the intake time it would take and the costs are very difficult as well. He stated that they can get a certain amount of an educational component into the streamlined program. They could increase that educational component by sending out publications without any major problems where if they do the diversion program, it would be a stand alone program that is going to require quite a bit more.

Commissioner Downey asked Chairman Randolph what was the second option again.

Chairman Randolph replied that Option A is to come up with a diversion program proposal in the form of a regulation and maybe answer some of the nagging legal questions that are out there. Option B would be to ask the Enforcement Division to come back to us with a memo, which is what we've typically done with our streamlined programs because they are basically just prosecutorial policy, explaining the parameters of an expanded streamlined program that would focus on the violations set forth in Option 2 on page 4 of the memo and bring that back as a proposal.

Mr. Williams commented that if the streamlined program was expanded they would be looking at mainly nonfilers of semi-annuals, recipient committees, some other violations where there is not a heavy evidentiary component to their violation.

Chairman Randolph stated they would not be looking at gift violations, lobbying violations, etc.

Mr. Williams said yes.

Commissioner Huguenin stated he had no objection to Option B provided that they keep Option A in mind. He said he at this juncture he did not want them to be abandoning diversion altogether. He stated he believes they could hold their decision about which of these two they

might want to do in abeyance and have the Enforcement Division fill out its non written recommendation made today about expanding the diversion program given an opportunity to write it up and bring it back to the next meeting. He added along with that he would like to have the numbers he asked for. He stated he believed they needed to get a fair sense of the efficiency that the Enforcement staff would assess the diversion program having in terms of time that wouldn't have to be spent on those 75 cases that would be free to make the rest of the Enforcement program better. Ultimately we can make an informed choice at the next meeting of the meeting after that about whether we want to go with expanded streamline or diversion.

Chairman Randolph asked Enforcement staff to come back with a memo that fleshes out the expanded streamlined idea and provides the numbers Commissioner Huguenin was talking about, in December. The idea is to have the next step be fairly limited in scope, merely fleshing out what Enforcement was already thinking about with the streamline program and coming up with some estimates on how much offsetting time we would gain from the diversion program. Then they could take that information and give the Enforcement staff guidance on how to proceed in the coming months about whether to move down a diversion road or the expanded streamline road.

Commissioner Blair commented or maybe some form of both.

Commissioner Remy stated he supports that. He said he would think that if they did not do the diversion down the road it becomes a useful thing that might enter into the discussion with Legislature about opportunities for expanded commission programs that we can't do because we don't have the money to do them. These are the sort of education programs would be very valuable and it may be another argument we can use to take a look at what our overall budget needs are.

Chairman Randolph stated that she believed they have a good idea of how much time an educational component would take. She stated that Ms. Wardlow estimates that if we did a bare-bones educational component, meaning we funnel people into what we generally what we have already with some expansion into the recipient committee area, that that would be about 400 hours.

Ms. Wardlow confirmed that is correct.

Chairman Randolph stated for just the educational component we are assuming it's about 400 hours to come up with educational programs not including an online or CD option. She stated it would be expanding the traveling educational program we already have.

Chairman Randolph confirmed that the requested memo would come back to the Commission in December

Item #20. Executive Director's Report.

Executive Director Mark Krausse stated there was nothing to add.

Item #21. Litigation Report.

General Counsel Luisa Menchaca stated there was nothing to add.

Chairman Randolph stated the only thing to mention on this is that we did have the hearing on October 4, 2006, in Agua Caliente case and it went very well. She stated Charity Kenyon was very good so hopefully we'll get a good decision on that. She added there is also as the report notes, a hearing has been scheduled in the Citizens case for November 17, 2006, here in Sacramento.

Item #22. Legislative Report.

Executive Director Mark Krausse stated there was nothing to add.

Chairman Randolph asked if there were any questions about the written report.

There were none.

Chairman Randolph adjourned to closed session at 11:00 a.m.

Closed session adjourned back to open session at 12:10 p.m.

Chairman Randolph announced that in closed session that the Commission voted to adopt the proposed decision of the Administrative Law Judge in its entirety in the matter of James Battin et al. The decision will become effective October 24, 2006. No further action was taken in closed session.

The meeting adjourned at 12:10 p.m.

Dated: November 1, 2006

Respectfully submitted,

Leah Yadon
Commission Assistant

Approved by:

Liane Randolph
Chairman